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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-93

JAMES GEORGE STAFOS,
Bankrupt-Petitioner,

vs.

LAURENCE M. JARVIS, Trustee in Bankruptcy,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATEMENT OF THE CASE

In 1945, the bankrupt-petitioner, and his wife acquired 13.2 acres of land in Wyandotte County, Kansas, as joint tenants. They have continuously resided on this land with their family since that date, operating thereon, a truck farm. Until March 1, 1966, the land was located outside the limits of any incorporated city, but by an ordinance taking effect on that date, the City of Kansas City, Kansas, extended its city limits, and annexed certain land including bankrupt's 13.2 acres. Since then the

bankrupt and his family have continued to reside on the land and operate it as a truck farm, and the property has continued to be wholly in, and a part of, the City of Kansas City, Kansas.

Four and one-half years after the annexation, on December 24, 1970, bankrupt filed his voluntary petition in bankruptcy, listing unsecured indebtedness in the amount of $612,132.06, and claiming as exempt under the Constitution and the Laws of the State of Kansas, the entire 13.2 acres of land. This land according to testimony was worth approximately $10,000.00 an acre. Bankrupt's wife, who was, and is, a joint tenant, residing on the property with her husband, did not join in the bankruptcy proceedings and is not now a party to this action.

Article 15, Section 9, of the Kansas Constitution which provides for the homestead exemption:

> "Homestead exemption. A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: Provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife: And provided further, That the legislature by an appropriate act or acts, clearly framed to avoid abuses, may provide that

when it is shown the husband or wife while occupying a homestead is adjudged to be insane, the duly appointed guardian of the insane spouse may be authorized to join with the sane spouse in executing a mortgage upon the homestead, renewing or refinancing an encumbrance thereon which is likely to cause its loss, or in executing a lease thereon authorizing the lessee to explore and produce therefrom oil, gas, coal, lead, zinc, or other minerals."

The Kansas Statute found at Kansas Statutes Annotated Chapter 60, Section 2301 provides as follows:

"Homestead; extent of exemption. A homestead to the extent of one hundred and sixty (160) acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence of the family of the owner, together with all of the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon. The provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife. (L. 1963, ch. 303, 60-2301; Jan. 1, 1964)"

The Trustee, Respondent herein, disallowed the claimed exemption of the entire 13.2 acres and set over to the bankrupt as his homestead, only one acre, pursuant to the Constitutional and Statutory Provisions of the State of Kansas as set out above. Since the wife of the bankrupt was not a party to the bankruptcy proceedings, she did not make any claim and to date, no Court has ruled on

the nature and extent of her interest in the property, if any.

The bankrupt objected to the exemption allowed by the Trustee and hearing was had before Referee Sullivant who approved the Trustee's Report of Exempt Property.

Bankrupt then petitioned the District Court for review of the Referee's Order, but the Court adopted the Referee's findings and conclusions and affirmed his Order, finding that the bankrupt was entitled only to an exemption of one acre under the Kansas Constitution and Statutory Law.

The bankrupt then moved the District Court to modify its previous Order, vacate its judgment and apply the abstention doctrine, instructing the Trustee to file a declaratory judgment in the State Court to determine the nature of bankrupt's homestead exemption, namely whether 13.2 acres was exempt as his homestead or only one acre. All motions were denied, excepting only that a new finding of fact was added stating that the land, except for improvements, had been farmed by the bankrupt since its acquisition and that it was then being farmed as a truck or vegetable farm.

Bankrupt then appealed to the Tenth Circuit Court of Appeals, which Court affirmed the ruling of the District Court.

Bankrupt's petition to this Court for a Writ of Certiorari followed.

REASONS WHY THIS WRIT SHOULD BE DENIED

Bankrupt here seeks a second appellate review of the District Court decision which he contends to be erroneous. The Trustee's position is that the case does not merit review.

The Trustee's position is founded on the knowledge that the jurisdiction of this Court to review cases by Certiorari was not granted to give the unsuccessful party in the Court of Appeals another hearing, but rather to resolve conflicts on federal questions among lower Courts, to pass on questions of broad, general importance under the Constitution and Laws of the United States, and to supervise generally the lower Federal Courts. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U.S. 159, 163. Accordingly, Rule 19 of this Court limits review by Writ of Certiorari to the Court's sound judicial discretion and "only where there are special and important reasons therefor".

In the Trustee's view, neither the bankrupt's petition for this Writ, nor his litigation generally, presents the considerations generally necessary to justify this Court's review by Certiorari.

In the first instance the looked-for conflict does not appear to be present. Certainly none is presented with opinions of this Court.

Nor is there any attempt to demonstrate a conflict among the Circuits on the issues here presented.

There does seem some attempt to create a conflict between the Tenth Circuit's opinion in this case and certain of its past opinions. *Jones* v. *Kemp*, 144 F.2d 478 (10th Cir. 1944), *United States* v. *Hershberger*, 308 Fed. Supp.

804 (D. Kan. 1972), *Bigley* v. *Jones*, 64 Fed. Supp. 389 (D.C. W.D. Okla. 1946), and *Hannon* v. *Sommer*, 10 Fed. 601 (C.C.D. Kan. 1881), relied upon to accomplish this by the bankrupt are of questionable help, however, in establishing this conflict, for those cases are substantially and factually different. Detailed factual analysis is not necessary. It should be sufficient to state that these cases all referred to the loss of a homestead by sale to satisfy indebtedness of the owner and they are decided on the basis that the homestead cannot be lost or alienated without the owner's consent. The instant case involves the size of the exemption allowed for a homestead, when the property originally outside the limits of a city is subsequently annexed to become a part of the city. All parties here agree that the bankrupt is entitled to a homestead exemption, the only question is whether it should be a rural one hundred sixty (160) acre exemption or an urban one (1) acre exemption. Hence, the cases to which this Court's attention has been directed do not provide the conflict relied upon.

Furthermore, it is generally accepted that except only for the most unusual of cases, a conflict with the District Court (for example the *Hershberger, Bigley* and *Hannon* cases cited above) does not merit Certiorari. The uniformity sought by this Court, is among Courts whose decisions are otherwise final absent review by this Court.

Furthermore, a conflict between decisions of the same Circuit (and all of the cases relied upon are from the Tenth Circuit) is ordinarily not a basis for granting Certiorari. This, of course, is for the principal reason that the later decision is controlling, but also for the reason that it is up to a Court of Appeals to reconcile its own internal disagreements. *Wisniewski* v. *United States*, 351 U.S. 901.

Implicit in bankrupt's petition is the claim that the ruling of the Tenth Circuit affirming the Referee and the District Court is in conflict with the Kansas State Court opinions. This appears predicated on the proposition that the homestead itself cannot be lost or alienated, without consent of the husband and wife residents. Yet the instant petition concerns not the loss, or alienation, of the homestead, but a determination of the size, or amount of allowable exemption as homestead for land which is farmed, yet within the limits of an incorporated city. It is for that distinction that the Tenth Circuit was precisely correct in relying upon the clearly expressed dictum of the case of *Sarahas v. Fenlon*, 5 Kan. 592 (1870) to the effect that only one (1) acre of farmed land within the limits of an incorporated city is exempt as homestead.

The precise language of this old, and perhaps hard to locate decision shows the Kansas view:

> "It is not necessary to recite the section of the constitution on which the claim as a homestead rests; it is familiar to all; it makes provisions for homesteads in two classes of cases, 'farming lands,' and in towns and cities; the first may be to the extent of one hundred sixty acres; the last is limited to one acre; in this case all the lands were 'farming lands', and if outside the city, no question would be made as to its exemption from forced sale under execution. But that part within the city has a different limitation; even if the claimant lived on that part within the city, he could hold but one acre as a homestead, exempt from execution, no matter whether it was worth $10 or $10,000, or whether it was used for farming purposes or was covered all over with a palatial residence. One acre is all that is exempt as a homestead under the Constitution. If he lived on that part in the city, that acre

would be his homestead, and the residue of the city property as well as his land in the country would be subject to forced sale under execution. This is the plain letter of the constitution; it cannot be enlarged by construction or made plainer by argument." *Sarahas* v. *Fenlon,* 5 Kan. 592, 595-6.

This language is dictum, but it has not been repudiated either directly or indirectly since its writing. Other Kansas cases, decided subsequently, have been consistent with this view. See for example, *Fletcher* v. *Weigel*, 152 Kan. 104, 107 P.2d 1055 (1940); and *Topeka Water Supply Co.* v. *Root*, 56 Kan. 187, 42 Pac. 715 (1895). In fact, no view inconsistent with the *Sarahas* dictum has ever been expressed by the Kansas Supreme Court.

Canvass of the law generally reveals that most jurisdictions in a like situation limit the landowner to an urban exemption. 40 C.J.S., Homesteads, Sec. 58.

Hence, it may be concluded, with some authority that the decisions of the Referee, the District Court and the Tenth Circuit Court of Appeals were not in conflict with other Circuits, the State of Kansas, or the law generally, and that the case does not deserve the attention of this Court by way of Certiorari.

Likewise, it appears that the importance of the issue raised by this petition does not justify this Court's review by Certiorari. Importance, as here used, is, admittedly, a most difficult concept to apply; nevertheless, there are some general standards. Before considering these, however, one must be clear as to what the issue or issues sought to be presented, may be.

Reviewing bankrupt's "Questions Presented" (bankrupt's petition for Writ of Certiorari, page 3), there seem but two issues. The first is: whether the bankrupt was

properly limited to a one acre urban exemption rather than a one hundred sixty acre farming exemption by virtue of the fact that his property was located within the limits of the City of Kansas City, Kansas, by virtue of its March, 1966 City Ordinance? The second is: whether the District Court erred in failing to apply the abstention doctrine.

In looking for the importance which would merit consideration of these issues by Certiorari, the beginning point is the requirement of "special and important reasons". This dictates an issue of broad general interest and importance to the public at large as distinguished from importance to, or the interest of, particular litigants. *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393. The Court does not sit nor grant Certiorari, merely for the benefit of particular parties. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 79. Nor is it sufficient that an issue be intellectually interesting or a solid problem; the Court does not sit to satisfy scholarly interests. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74. The Court's interest reaches "beyond the academic or episodic". *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74. Even the presentation of "serious legal questions" is not alone sufficient. *Cf. English* v. *Cunningham,* 361 U.S. 905, 907.

Finally, and logically, even though a Constitutional issue is raised, this is not sufficient, in and of itself, to require Certiorari unless the issue is of real, substantial, general, and immediate importance. See, the dissenting opinion of Mr. Justice Frankfurter in *Darr* v. *Burford,* 339 U.S. 200, 227.

These guides are not new to this Court, of course; they came from the Court's own pronouncements. But their repetition here helps place in perspective the issues

in which the bankrupt now seeks to enlist the Court's interest.

The absence of substantial public interest is patent. The fact problem grew from a unique co-mingling of one State's particular homestead exemption together with a city's annexation pursuant to one of the two available statutory procedures: Kansas Statutes Annotated Chapter 13, Section 1602 a and Chapter 12, Section 501 et seq. The city, in this particular instance, chose the procedure provided by Kansas Statutes Annotated Chapter 13, Section 1602 a (which is set out on page 24 of the appendix to petitioner's petition). This unlikely combination of fact and law, while important to these parties, does not bring with it the broad, substantial, significant public interest which justifies the extraordinary remedy of Certiorari. The Trustee is of the opinion that without saying more, it may properly be concluded that the issues here presented do not exhibit the importance which justifies this Court's interest and inquiry.

Having come this far, it may seem unnecessary finally to recall that mere error in a Court below is not sufficient to invoke this Court's jurisdiction by Certiorari. This is pointed out, however, because of the apparent heavy reliance bankrupt places upon error. One of the two arguments made by the bankrupt in support of his petition is that "the decisions of the District Court and the Court of Appeals were clearly erroneous * * *" (petition, page 15). The thrust of bankrupt's argument is "that the decision of the Trial Court and the Court of Appeals misapplied the law and constitutional provisions of Kansas * * *." (Bankrupt's petition, page 16). Mr. Chief Justice Vinson answered this most directly: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower Court decisions." This sentence

taken from his address to the American Bar Association, September 7, 1949, and reprinted in 69 S.Ct. v, vi, is representative of a view which has been reiterated many times. Absent some gross miscarriage of justice undemonstrated by bankrupt's petition, error does not justify Certiorari.

CONCLUSION

The jugular vein of Certiorari is bivalved: conflict and importance. Careful review of available authority reveals no conflict of substance with the decisions of the lower Courts in this instance. Their decision has not been shown to conflict with the views of this Court nor of any other Circuits. No real conflict was shown with other opinions of the Tenth Circuit but rather a factual dissimilarity. The cases relied upon concerned the loss of the homestead property by sale, a fact not present in the instant matter. No conflict was shown with the opinions of the Courts of the State of Kansas, in fact, the decisions of the lower Courts relied upon, and were consistent with, the only available authority from Kansas, the dictum of *Sarahas* v. *Fenlon.*

The issues presented do not bring the broad, general public importance requiring Certiorari. In fact, the issue most strongly relied upon appeared only as a result of an unusual interplay of one state's homestead exemption and a city ordinance passed pursuant to state statute (one of alternative procedures available).

Left only with error to sustain his request for Certiorari, it is urged that the bankrupt has not met the heavy burden imposed upon him. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U.S. 159, 163.

It is urged that bankrupt's petition for a Writ of Certiorari be denied.

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